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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

CELA

MUR: 6866
DATE COMPLAINT FILED: Sept. 9, 2014
DATE OF NOTIFICATION: Sept. 15, 2014
LAST RESPONSE RECEIVED: Nov. 4, 2014
DATE ACTIVATED: Jan. 29, 2015

ELECTION CYCLE: 2014
EXPIRATION OF SOL: Aug. 23, 2019

COMPLAINANT: Kelly Maher, Executive Director
Compass Colorado

RESPONDENT: Mark Udall

**RELEVANT STATUTES AND
REGULATIONS:** 52 U.S.C. § 30125(e)(1)(B)
52 U.S.C. § 30125(e)(3)
11 C.F.R. § 300.2(m)
11 C.F.R. § 300.60
11 C.F.R. § 300.62
11 C.F.R. § 300.64

INTERNAL REPORTS CHECKED: None

OTHER AGENCIES CHECKED: Colorado Secretary of State, Campaign Finance
Disclosure Website

I. INTRODUCTION

The Complaint alleges that then-U.S. Senator and federal candidate Mark Udall illegally solicited non-Federal funds in connection with a fundraiser for Colorado state House candidate Crisanta Duran in violation of the Federal Election Campaign Act of 1971, as amended (the "Act"). Udall's Response maintains that his solicitation at the fundraiser complied with the Act's contribution and source prohibitions because he requested donations of \$100 solely from individuals who attended the fundraiser, and he requests that the Complaint be dismissed.

As discussed below, the available information shows that Udall may have impermissibly solicited funds outside of the Act's limits and prohibitions in connection with the fundraiser. Nevertheless, in light of the small amount of funds potentially at issue, it is not worth the use of further Commission resources to pursue this matter. We recommend, therefore, that the Commission exercise its prosecutorial discretion and dismiss the Complaint in this matter.

II. FACTUAL AND LEGAL ANALYSIS

A. Facts

On August 23, 2014, then-U.S. Senator and U.S. Senate candidate Mark Udall appeared as a "special guest" at a fundraiser for Crisanta Duran, a Colorado state representative who was seeking re-election to her state House seat. The fundraiser was advertised as a "Campaign Kick-off and Birthday Celebration."¹ A transcript of remarks by Udall and other speakers indicates that Udall solicited donations for Duran's re-election at the fundraiser, stating in pertinent part:

... So, [Duran's] a 30-something and multiply that by three, that means everybody should have at least written a \$100 check. Cause we need to send her back to the State House and we need to keep the State House in the majority ...²

Information attached to the Complaint shows that the fundraiser was publicized on Twitter and in an electronic invitation prior to the event. Specifically, Complainant provided a copy of a state campaign finance complaint she filed against Duran's state campaign committee, Duran for Colorado ("DFC"),³ which includes information about the fundraiser, including a

¹ Compl. at 1.

² Compl. Ex. A.

³ See Compl. at 1 and Ex. B ("state complaint"). The state complaint, filed one day before the Complaint was filed in this matter, alleges that DFC violated Colorado state law by accepting in-kind corporate contributions in the form of food and drinks for the August 23, 2014, fundraiser.

Following a September 22, 2014, public hearing on the complaint, an Administrative Law Judge issued an "Agency Decision" finding that DFC did not violate Colorado law. See *In the Matter of the Complaint filed by Kelly Maher Regarding Alleged Campaign and Political Finance Violations by Duran for Colorado, a Candidate*

1 tweet sent from a Duran Twitter account, @crisantaduran, the day before the event. The tweet
2 states, "Tacos, cupcakes & live music tomorrow night? madmimi.com/p/be6405?fe=1&... [link
3 to electronic invitation] Everyone is invited!"⁴ The link embedded in the tweet directs the reader
4 to an electronic invitation inviting the public to a "Campaign Kick Off & Birthday Celebration
5 with Special Guest U.S. Senator Mark Udall" on August 23, 2014, and lists the venue address
6 and time.⁵ The invitation asks the reader to join a list of hosts who have already sponsored the
7 event at the gold (\$400) and silver (\$250) levels; Udall and a number of state and local officials
8 are listed as "special confirmed guests." The invitation solicits a "Suggested Donation" of \$50
9 but notes that donations are "welcome but not required." It asks recipients to "RSVP:
10 DuranforColorado@gmail.com."⁶ Lines at the top and bottom of the invitation invite those who
11 are unable to attend but would like to contribute to click on embedded hyperlinks.

12 The hyperlinks embedded in the electronic invitation redirect recipients to an ActBlue⁷
13 fundraising page for "Crisanta Duran for Colorado" that provides clickable options for one-time
14 contributions of \$25, \$100, \$250, and a blank box to enter any amount.⁸ Below the one-time

Committee, Case No. OS 2014-0024, State of Colorado Office of Administrative Courts, (Nov. 13, 2014) ("state decision"). Information contained in the state decision is discussed *infra*. A copy of the decision, obtained from the Colorado Secretary of State's Campaign Finance Disclosure database,

⁴ State Compl. at Ex. A (Twitter post).

⁵ State Compl. at Ex. B (electronic invitation).

⁶ The invitation also states that food and drinks will be provided by small businesses located in Duran's legislative district and includes information about them. *Id.* The invitation appears to be from DFC in that it contains a "Duran[,] Democrat for State Representative HD5" image at the top and a "Duran for Colorado" copyright, requests RSVPs to a DFC email, and lists the campaign website address.

⁷ ActBlue, a Massachusetts limited liability company, operates and maintains a website that provides Internet-based tools for Democratic candidates and committees to solicit and process contributions. It is also registered with the Commission as a non-connected committee. See Advisory Op. Req. at 1, AO 2014-19 (ActBlue) and Advisory Op. Req. at 1, AO 2007-27 (ActBlue).

⁸ State Compl. at Ex. C (ActBlue donation page).

amount options, the page provides a second clickable option to make monthly contributions in the aforementioned amounts for six months or one year. The bottom of the ActBlue donation page provides "Contribution Rules" written in the form of affirmations by the donor that:

1. This contribution is made from my own funds, and funds are not being provided to me by another person or entity for the purpose of making a contribution.
2. I am making this contribution with my own personal credit card and not with a corporate or business credit card or card issued to another person.
3. I am at least eighteen years old.
4. I am a United States Citizen.

The available information shows that the fundraiser was co-hosted by DFC and Duran for Colorado Leadership Fund (the "Leadership Fund")⁹, a state political committee able to raise and accept corporate and union contributions.¹⁰ The administrative decision resolving the state complaint against DFC recognizes as a "stipulated fact" that DFC co-hosted the fundraiser with the Leadership Fund.¹¹ Further, the Leadership Fund disclosed the receipt of in-kind contributions in the form of food and wine provided at the fundraiser by two incorporated local

⁹ The Leadership Fund's stated purpose at the time of the fundraiser was "to support Democratic candidates to the Colorado General Assembly." Committee Registration Form, *id.* (Apr. 14, 2014). Duran has served as the registered agent of the Leadership Fund since its inception in October 2012. *See* Committee Registration Form, Duran for Colorado Leadership Fund (Oct. 2, 2012) and amended Committee Registration Form, *id.* (Oct. 6, 2014), available at <http://tracer.sos.colorado.gov/PublicSite/SearchPages/FilingAmendmentSelect.aspx?FilingID=151560>.

¹⁰ Colorado law prohibits state candidate committees from accepting corporate and union contributions, but other types of state political committees may accept corporate and labor union contributions of up to \$550 per the two-year state House election cycle. *See* COLORADO CONST. art. XXVIII § 3(4)(a) (prohibiting candidate committees from accepting contributions from corporations and labor unions) and COLO. REV. STAT. § 1-45-103.7(1) (2014) (clarifying that nothing in the Colorado Constitution shall be construed to prohibit a corporation or labor organization from making a contribution to a political committee). *See also* Colorado Secretary of State, *Colorado Campaign and Political Finance Manual* (August 2014) at 41 (chart indicating that corporate and labor unions may contribute up to \$550 to political committees per two-year House election cycle); available as a PDF at <http://tracer.sos.colorado.gov/PublicSite/Search.aspx>.

¹¹ State decision at 2, n.5.

1 businesses featured in the invitation.¹² And two additional forms of pre-event publicity for the
2 fundraiser — an “invitation flyer” and an “announcement” — each apparently identified DFC
3 and the Leadership Fund as sponsors since they set out the relevant rules governing donations to
4 each.¹³ Finally, disclosure reports filed by DFC and the Leadership Fund show that they jointly
5 sponsored the fundraiser and raised donations in connection with it. Specifically, DFC and the
6 Leadership Fund each reported disbursements in June and August 2014 to a printing company
7 for “birthday party invitations” and to a robocall vendor for “birthday party calls.”¹⁴ In addition,
8 DFC made disbursements for food, rent, and entertainment for the fundraiser and the Leadership
9 Fund disbursed funds for food, drinks, and supplies for the event.¹⁵ The committees also
10 reported receiving donations that appear to be in connection with the fundraiser. Between July
11 27 and August 27, 2014, the reporting period during which the fundraiser was held, DFC

¹² State decision at 2-3. The decision concludes that DFC did not violate Colorado law because the Leadership Fund accepted and reported the in-kind corporate contributions of food and drinks for the fundraiser, and state law does not require fundraiser expenses to be allocated between the committees. *See id.* at 4-5.

¹³ State decision at 2. The decision does not say whether Udall was mentioned in those materials. A July 1, 2014, tweet from the @crisantaduran Twitter account linked to a brief “Save the Date” announcement for the fundraiser in what appears to be a three-item newsletter. The announcement stated it was paid for by DFC and the Leadership Fund, but unlike the materials described in the state decision, it makes no mention of donation rules. It does not reference Udall.

A Duran Birthday Celebration fundraiser held in 2013 was similarly co-sponsored by DFC and the Leadership Fund. The invitation to it appears similar to the additional 2014 publicity materials described in the state decision in that it identifies both committees and informs donors of the different rules governing contributions to each. *See* <http://www.icontact-archive.com/PX0U1-9kSYQMa7KYGyute5P4pJfoFQSk?w=1>.

¹⁴ *See* DFC June 16, 2014 Report of Contributions and Expenditures at 5; DFC September 2, 2014, Report of Contributions and Expenditures at 26; Leadership Fund June 16, 2014, Report of Contributions and Expenditures at 4; Leadership Fund September 2, 2014, Report of Contributions and Expenditures at 17. All citations to the state reports here and in the following footnote are to pages of the PDF version of each report available in the Voting Ballot Matters folder.

¹⁵ *See* DFC September 2, 2014, Report of Contributions and Expenditures at 26-27; DFC September 15, 2014, Report of Contributions and Expenditures at 5; Leadership Fund September 2, 2014 Report of Contributions and Expenditures at 16, 18-19.

1 reported receiving \$11,120 in donations, and the Leadership Fund reported receiving \$7,052,
2 including \$1,037 in in-kind contributions of food and drinks.¹⁶

3 Further, the available information shows that corporate and union funds were raised at the
4 fundraiser. The administrative decision resolving the state complaint against DFC also
5 recognizes as "stipulated facts" that corporate donations were raised at the fundraiser, and that all
6 corporate checks were written to the Leadership Fund.¹⁷ Of the donations the Leadership Fund
7 reported receiving during that period, \$1,850 is attributable to identifiable corporations and a
8 union, including \$750 in in-kind contributions of food and drinks from incorporated small
9 businesses listed in the invitation.¹⁸

10 **B. Legal Analysis**

11 The Act and Commission regulations prohibit federal candidates and officeholders from
12 soliciting funds in connection with a non-Federal election unless those solicitations are restricted
13 to funds that are from sources permitted by the Act, that are in amounts that do not exceed the
14 Act's contribution limits, and that are consistent with State law.¹⁹ Federal candidates and
15 officeholders may participate in fundraising events held in connection with a non-Federal
16 election at which federally non-compliant funds are solicited and in publicity for those events,

¹⁶ See DFC and Leadership Fund September 2, 2014, Reports of Contributions and Expenditures, *supra*.

¹⁷ State decision at 3, n.5.

¹⁸ The identifiable federally impermissible donations were: \$550 each from UCFW Local 881 and Viaero Wireless on August 27, 2014, and in-kind contributions on August 23, 2014, of \$550 from Bonaquisit Wine Co. and \$200 from Los Carboncitos for food and wine for the fundraiser.

¹⁹ 52 U.S.C. § 30125(e)(1)(B); 11 C.F.R. §§ 300.60, 300.62. See also 52 U.S.C. §§ 30116(a)(1)(A) and (a)(2)(B) (limiting per-election contributions to \$2,600 from individuals and \$5,000 from non-party multi-candidate political committees during the 2014 election cycle); 30118(a) (prohibiting corporate, labor organization, and national bank contributions); 30119 (prohibiting contributions from federal contractors and prohibiting any person from knowingly soliciting such contributions); and 30121 (prohibiting contributions and donations from foreign nationals and prohibiting any person from soliciting, accepting or receiving such contributions).

1 but their participation is governed by Commission regulations at 11 C.F.R. § 300.64.²⁰
2 Specifically, federal candidates and officeholders are permitted to attend, speak, or be a featured
3 guest at fundraising events for non-Federal elections, and may solicit funds, but must limit any
4 solicitations to amounts and sources permissible under the Act.²¹ A Federal candidate or
5 officeholder may limit his or her solicitation by displaying at the fundraiser a clear and
6 conspicuous written notice or by making a clear and conspicuous oral statement that the
7 solicitation does not seek funds in excess of \$2,600 from individuals or \$5,000 from non-party
8 multi-candidate federal political committees and does not seek funds from corporations, labor
9 organizations, national banks, federal government contractors, or foreign nationals.²² The oral
10 statement can be made by the Federal candidate or officeholder or an event official before any
11 solicitations are made by the Federal candidate or officeholder, such as in opening remarks.²³

12 Further, a Federal candidate or officeholder or his or her agent may approve, authorize,
13 agree to, or consent to the use of the Federal candidate's or officeholder's name in publicity for a
14 fundraiser for a non-Federal election that contains a solicitation for funds outside the Act's
15 limitations and source prohibitions only if: 1) the candidate is identified, *inter alia*, as a featured
16 or special guest or in a manner not related to fundraising; and 2) the publicity includes a clear
17 and conspicuous disclaimer that the solicitation is not being made by the Federal candidate or

²⁰ See also Participation by Federal Candidates and Officeholders at Non-Federal Fundraising Events, 75 Fed. Reg. 24,375, 24,377 (May 5, 2010) (Explanation & Justification) ("Non-Federal Fundraising Events E&J").

²¹ 52 U.S.C. § 30125(e)(3); 11 C.F.R. § 300.64.

²² See 11 C.F.R. § 300.64(b)(2). A candidate may also limit a solicitation by its express terms such as by stating she is asking for donations of up to \$100 from individuals provided they are not federal contractors or foreign nationals. See Non-Federal Fundraising E&J, 75 Fed. Reg. at 24,380 ("The Commission concludes that any solicitation that is not limited *either by its express terms* or otherwise (such as through a clear and conspicuous oral or written notice) risks being understood as soliciting donations in amounts and from sources prohibited under the Act . . .") (emphasis added).

²³ Non-Federal Fundraising Events E&J, 75 Fed. Reg. at 24,380.

1 officeholder. 11 C.F.R. § 300.64(c)(3)(i)(A) and (B). The following disclaimer is an example
2 that satisfies the clear and conspicuous requirement: "All funds solicited in connection with this
3 event are by [name of non-Federal candidate or entity] and not by [name of Federal
4 candidate/officeholder]." 11 C.F.R. § 300.64(c)(3)(iv).

5 The Complaint alleges that Udall violated the Act by soliciting non-Federal funds at the
6 August 23, 2014, fundraiser, focusing on his oral solicitation that "everybody should have at
7 least written a \$100 check . . . [be]cause we need to send her back to the State house" The
8 Complaint appears to suggest either that Udall's solicitation was illegal because he asked for
9 funds to help re-elect Duran to state office or because he solicited donations at a fundraiser
10 where illegal in-kind corporate contributions were solicited and accepted by DFC in the form of
11 food and drink provided by corporate vendors.²⁴

12 Udall argues that his solicitation complied with Section 30125(e)(1) and 11 C.F.R.
13 § 300.62 because, "according to the complaint, [he] asked each individual attendee for \$100," an
14 amount below the \$2,600 statutory limit for individuals during the 2014 election cycle.²⁵ Udall
15 contends that the funds were requested from individuals only, citing Colorado's prohibition on
16 corporate and labor organization donations to state candidates. *Id.* Udall also maintains that
17 neither the Act nor the regulations require federal candidates to inquire whether a sponsoring
18 campaign paid fair market value for event costs. Udall further maintains that even if DFC
19 accepted an in-kind corporate contribution at the event, a federal candidate can still solicit
20 federally permissible funds at an event where non-Federal funds are raised, citing the Non-

²⁴ Compl. at 1 and by reference to Ex. B at 3. The Complaint does not cite a specific provision of the Act or regulations in alleging that Udall illegally solicited funds, but we read it as an allegation that Udall violated Section 30125(e)(1)(B). In a parenthetical below the Complainant's signature, the Complaint states that legal citations for the campaign finance violations alleged have been omitted "[i]n accord with Federal Election Commission guidance." The meaning of the statement is unclear.

²⁵ Resp. at 2.

1 Federal Fundraising Events E&J, 75 Fed. Reg. at 24,376. *Id.* The Response does not
2 specifically address the invitation to the fundraiser attached in Complaint Exhibit B.

3 Based on the available information, the August 23, 2014, fundraiser appears to have been
4 one at which funds outside the Act's limits and prohibitions were solicited and received: the
5 event was co-sponsored by the Leadership Fund, an entity permitted to solicit and accept
6 corporate and labor union donations and that seems to have solicited such donations in other pre-
7 event publicity materials; the stipulated facts in the state decision indicate that corporate funds
8 were raised at the event and that corporate checks were written to the Leadership Fund; and the
9 Leadership Fund reported accepting \$1,850 in identifiable corporate and union donations at the
10 time of the fundraiser.

11 Though the Act does not prohibit Udall from appearing as a "special guest" or soliciting
12 funds at this fundraiser, Udall may have nonetheless violated 52 U.S.C. § 30125(e)(1)(B)
13 because the available information does not show that his solicitation was properly restricted to
14 amounts and sources permissible under the Act. Udall's request that attendees should have "at
15 least written a \$100 check" without any mention of federal source prohibitions and limitations
16 fails to properly limit the solicitation to federally compliant funds. Under Section 300.64,
17 Udall's solicitation could have been limited by a clear or conspicuous oral or written disclaimer
18 that he was not requesting donations from federally impermissible sources including
19 corporations, labor unions or federal contractors or in impermissible amounts. The transcript of
20 remarks made by Udall and others at the event, however, does not show that Udall limited his
21 solicitation by making an oral disclaimer. Nor does the available information indicate whether

1 event officials or others made such an oral statement or that a written notice was displayed
2 limiting his solicitation.²⁶

3 Similarly, if Udall approved the use of his name in the above-described electronic
4 invitation, he may have violated Section 30125(e)(1)(B) because the invitation includes
5 hyperlinks directing recipients to the ActBlue donation page, which solicits funds from sources
6 prohibited by the Act.²⁷ The donor affirmations listed under the "Contribution Rules" on the
7 ActBlue donation page exclude donations from some, but not all, federally impermissible
8 sources through the donor affirmations. Donations from corporations and foreign nationals are
9 prohibited in that the affirmations are written in the form of statements that the donor is a U.S.
10 citizen and is not making a donation with a corporate credit card. The statement that the donor is
11 not making a donation with a business credit card may be read to implicitly prohibit donations
12 from national banks and labor unions. Donations by individual federal government contractors,
13 however, are not addressed.²⁸ Thus, Udall could have authorized or agreed to the use of his name

²⁶ See 11 C.F.R. § 300.64(b)(2); *see also* Non-Federal Fundraising Events E&J, 75 Fed. Reg. at 24,379 (providing as an example of a permissible solicitation under Section 300.64(b)(2) a statement that includes the source restrictions).

²⁷ A "solicitation" is an oral or written communication that contains a clear message requesting that another person make a donation and includes a communication that redirects an Internet user to a Web specifically dedicated to facilitating the making of donations. *See* 11 C.F.R. § 300.2(m)(1)(i) and (iii).

²⁸ The invitation could also be viewed as soliciting contributions in excess of the Act's limits. Although the body of the invitation requests a suggested donation of \$50 and the clickable options on the ActBlue donation page request enumerated donations within the Act's limitations, the donation page allows a donor to fill in another amount or make a donation in the enumerated or filled-in monthly amount for six months or one year. *Id.* Thus, a donor could conceivably contribute an amount that exceeded the Act's 2014 individual contributions limit of \$2,600 by making a \$250 donation each month for a year for a total of \$3,000, or by filling in an amount that exceeded \$2,600 by itself or when aggregated over six months or a year. However, ActBlue represents on its website that it is configured so that each contribution form is pre-set to accommodate contribution limits in the jurisdiction of each state and local campaign. *See* <http://support.actblue.com/faq#q16>. Colorado limits donations to candidate committees by individuals, federal PACs, and non-corporate entities to \$200 per election and by small donor committees to \$2,250 per election. *See Colorado Campaign and Political Finance Manual, supra*, at 38, <http://tracer.sos.colorado.gov/PublicSite/Search.aspx>.

as a featured guest in the invitation only if it included a clear and conspicuous disclaimer that Udall was not soliciting such donations. *See* 11 C.F.R. § 300.64(c)(3)(i) and (iv).

Notwithstanding these potential violations, we recommend that the Commission exercise its prosecutorial discretion and dismiss the Complaint because the Leadership Fund disclosed the receipt of only \$1,850 in identifiable federally prohibited funds apparently attributable to the fundraiser. In light of this limited amount, this matter does not warrant the use of further Commission resources to investigate whether an acceptable disclaimer was provided at the fundraiser, or whether Udall consented to the use of his name in the electronic invitation.²⁹ Accordingly, we recommend that the Commission exercise its prosecutorial discretion and dismiss the Complaint in this matter.


III. RECOMMENDATIONS

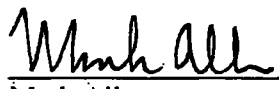
1. Dismiss the Complaint in this matter.
2. Approve the attached Factual and Legal Analysis..
3. Approve the appropriate letter.
4. Close the file.

Date

5-29-15

BY:


Kathleen Guith
Deputy Associate General Counsel for
Enforcement


Mark Allen
Assistant General Counsel

²⁹ See Factual and Legal Analysis at 7, MUR 5918 (Delaware Republican Committee) (Commission dismissed as an exercise of its prosecutorial discretion matter involving pre-event publicity featuring a federal candidate where the estimated total amount raised at the fundraiser was \$4,875, and it appeared unlikely that attendees contributed amounts vastly higher than the \$15-\$25 ticket price despite the "fill in the blank" contribution option in the invitation).

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Dawn M. Odrowski by MA

Dawn M. Odrowski
Attorney

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